

ST 03-5

Tax Type: Sales Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

JOHN DOE as
Responsible Officer of
ABC OIL COMPANY,

No. 02-ST-0000
Reg. No. 0-00000, 000000
NPL Nos. 0000, 0000

Kenneth J. Galvin
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Adalbert Vlazny III, on behalf of John Doe; Mr. John Alshuler, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to John Doe's (hereinafter "Doe") protest of Notice of Penalty Liability Nos. 0000 and 0000 (hereinafter the "NPL's") as responsible officer of ABC Oil Company. NPL No. 0000 covers the period January, 1991 through September, 1991, and NPL No. 0000 covers various periods between January, 1990 through December, 1991. A hearing was held in this matter on December 18, 2002, with Doe providing oral testimony. Following submission of all evidence and a review of the record, it is recommended that NPL No. 0000 be cancelled and that NPL No. 0000 be finalized for excise tax included in assessment 0 000000 only. In support thereof, the following "Findings of Fact" and "Conclusions of Law" are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of NPL Nos. 0000 and 0000, both dated December 14, 1994, which show an excise tax liability, including penalty and interest for ABC Oil Company in the amounts \$1,281.57 and \$8,589.82, respectively, including interest calculated through the date of issuance. Dept. Ex. No. 1.
2. Ron Doe, John's father, operated a business known as ABC Oil Company, located in Anywhere Illinois. Tr. p. 10.

Conclusions of Law:

The sole issue to be decided in this case is whether Doe should be held personally liable for the unpaid excise tax of ABC Oil Company. The statutory basis upon which any personal liability is premised is Section 13½ of the Retailers' Occupation Tax Act, which provides in relevant part:

Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment *** and who willfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon; The Department shall determine a penalty due under this Section according to its best judgment and information, and such determination shall be *prima facie* correct and shall be *prima facie* evidence of a penalty under this Section.
Ill. Rev. Stat., ch. 120, par. 452½ (1987).

It is clear under Section 13½ that personal liability will be imposed only upon a person who: (1) is “responsible” for filing corporate tax returns and/or making the tax payments; and (2) “willfully” fails to file and/or pay such taxes.¹

The admission into evidence of the NPL establishes the Department’s *prima facie* case with regard to both the fact that Doe was a “responsible” officer and the fact that he “willfully” failed to file and or pay. Branson v. Department of Revenue, 168 Ill. 2d 247, 262 (1995). Once the Department has established a *prima facie* case, the burden shifts to the taxpayer to overcome the case. Masini v. Department of Revenue, 60 Ill.App.3d 11 (1st Dist. 1978).

The excise taxes at issue in this case accrued between January, 1990, and December, 1991. Conflicting evidence was presented at the hearing with regard to Doe’s position with ABC Oil Company during the accrual of the taxes. Doe’s “Petition For Hearing,” filed with the Department in February, 1995, states that Doe was elected as president of ABC Oil Company by his father “during the period January 12, 1990 to July 15, 1991.” Resp. Ex. No. 1. On the other hand, the Department’s “Report of Interview with Persons Relative to Recommendation of 100-Percent Penalty,” states that Doe was president and secretary in 1990 and that Doe’s father, Ron Doe, was president and secretary “from 1991.” The Department’s interview was conducted with Doe on July 24, 1992, and the interviewer was not called to testify at the evidentiary hearing. Resp. Ex. No. 3. Ron Doe is now deceased. Tr. p. 6. When asked about the conflicting dates

¹ Prior to January 1, 1994, Section 13½ of the Retailers’ Occupation Tax Act governed the assessment of personal tax penalties against responsible corporate officers or employees. However effective January 1, 1994, the penalty provision of Section 13½ was replaced by Section 3-7 of the Uniform Penalty and Interest Act (35 ILCS 735/3-7). Here the taxes accrued in 1990 and 1991, while Section 13½ was in effect. On the other hand, the NPL’s were not issued until December 14, 1994. Thus, a question arises as to whether Section 13½ or Section 3-7 controls the case at hand. In Sweis v. Sweet, 269 Ill.App.3d 1, 12 (1995), it was held that the penalty provision “in effect at the time the tax was incurred” should be applied. In accordance with this holding, I conclude that Section 13½ is controlling.

during cross-examination, Doe testified that to the best of his recollection, he was president during the period of 1990 when the company was in transition. Tr. pp. 21-22.

ABC Oil Company's IL-941, "Employer's Quarterly Illinois Withholding Tax Return" for tax period ending December 31, 1991, signed on January 10, 1992, contains the signature of "John Doe." Doe denies signing this form. Tr. pp. 12-13; Resp. Ex. No. 2. When compared with Doe's "Petition for Hearing," document of record, the signature does not appear to be Doe's. All other IL-941's, for years 1992-1994, are signed by "Ron Doe" as "President." Resp. Ex. No. 2. Doe testified that he did not sign any "books, records, reports or anything on behalf of the corporation," and that he was not a shareholder and did not receive any compensation from ABC Oil Company. Tr. pp. 11, 19. According to Doe, he did not have contact with his father as far as the "day-to-day operation of the business was concerned." Tr. pp. 19-20.

I conclude that Doe served as president of ABC Oil Company in 1990. I reach this conclusion based on Doe's own testimony and because Doe's response to the Department's interview in 1992, *i.e.* that he was president and secretary during 1990, is closer in time to the actual accrual of the excise taxes and therefore, more likely to be accurate. ABC Oil Company's bylaws are not in evidence, and the record does not show what duties and responsibilities were vested in the office of president. The president of a corporation is usually charged with overall responsibility for the management of the corporation. Without any documentary evidence to the contrary, I must assume that this was the case with ABC Oil Company. Responsibility is a matter of status, duty and authority, not necessarily knowledge. Mazo v. United States, 591 F.2d 1151 (5th Cir. 1979). Liability for unpaid tax attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970).

Although Doe testified that he did not have day-to-day involvement with the corporation, as president, he had the status and authority to exercise significant control over ABC Oil Company's business affairs and he had the power and responsibility to see that excise taxes were remitted. If, as president, he chose not to be involved, this would not be sufficient to relieve him of responsibility under the statute. A responsible person cannot escape his obligation to ensure that taxes are paid by delegating responsibility to others. Wright v. United States, 809 F. 2d 425 (7th Cir. 1987). I conclude that Doe has failed to rebut the Department's *prima facie* case that he was a responsible officer of ABC Oil Company in 1990. Therefore, the only remaining question is whether Doe "willfully" failed to pay the sales taxes.

Section 13½ fails to define what constitutes a willful failure to pay or file taxes. Branson v. Department of Revenue, 168 Ill. 2d 247, 254 (1977). In attempting to clarify what constitutes a willful failure to file or pay taxes, the courts have adopted a broad interpretation of the words "willfully fails." Department of Revenue ex rel. People v. Corrosion Systems, Inc., 185 Ill.App.3d 580 (4th Dist. 1989). Under this broad interpretation, responsible officers are liable if they delegate bookkeeping duties to third parties and fail to inspect corporate records or otherwise fail to keep informed of the status of the tax returns and payments. Branson *supra* at 267.

The Department presents a *prima facie* case for willfulness with the introduction of the NPL's into evidence. "To rebut the presumption, the person defending against the penalty must adduce sufficient evidence to disprove willful failure to file returns and pay taxes." Branson, *supra* at 262. It is clear from Doe's own testimony that in spite of being president of ABC Oil Company in 1990, he abdicated any responsibility for unpaid taxes to his father. Tr. p. 20. In doing so, he failed to inspect the corporate records and keep informed of the status of the excise tax returns and

payments. Doe has failed to meet his burden of producing credible evidence to rebut the Department's *prima facie* case of willfulness.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Penalty Liability No. 0000 be cancelled and that NPL No. 0000 be finalized for excise tax included in assessment 0 000000 only, which was incurred from January, 1990, through December, 1990.

March 17, 2003

Kenneth J. Galvin
Administrative Law Judge